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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re D.P., et al., Persons Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

I. C. and D. H.,

Defendants and Appellants.

B208462

(Los Angeles County
Super. Ct. No. CK70894)

APPEAL from an order of the Superior Court of Los Angeles County,
Jan G. Levine, Judge. Affirmed and remanded as to appellant I.C. Appeal filed by
D.H. is dismissed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and
Appellant, Irina C.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County
Counsel, and Jacklyn K. Louie, for Plaintiff and Respondent.

In this dependency case (Welf. & Inst. Code, §300 et seq.),¹ I.C., mother of the minor children D.P. and S.P. (Mother, D.P. and S.P., respectively), appeals from a disposition order. She challenges the sufficiency of the evidence to support an adjudication finding that she knew that the father of the minor children was sexually abusing them and she failed to protect the children. The reporter's transcript from the adjudication/disposition hearing shows that the trial court's spoken finding is that Mother knew *or should have known* of the father's abuse and failed to protect the minors. The section 300 dependency petition can be amended upon remand of this case to include the italicized language.

D.H., the father of the minor children (Father), also filed an appeal from the disposition order. His appointed appellate counsel informed this court that after examination of the record she was not able to identify any arguable issues on Father's behalf. We advised Father that he has the right to personally submit any contentions he feels the court should consider, and that his appeal would be dismissed in the absence of arguable issues. Because Father has not presented issues for this court's consideration, his appeal will be dismissed.

BACKGROUND OF THE CASE

1. Events Leading Up To Detention of the Minors

D.P. (April 1997) was ten years old when he was detained by the County of Los Angeles Department of Children and Family Services (the Department). His sister

¹ Unless otherwise indicated, all references herein to statutes are to the Welfare and Institutions Code.

S.P. (February 2001) was six years old. Their father is D. H. (Father). Mother and Father lived in the same home with the minors until Father was arrested and charged with lewd acts on a minor. The arrest came after a federal search warrant related to child pornography was executed at the parents' home and the minors were interviewed by local and federal law enforcement officers and a social worker from the Department.

A Department social worker interviewed Mother and Father in their home on November 27, 2007, when officers were executing the federal search warrant there. Mother stated she was told the officers were looking for pictures on a computer. She stated Father uses a laptop which he is always on, and he leaves it out in the open in the living room, where she has seen him looking at pictures of naked people, which she assumed was pornography. She did not think the children ever saw the pictures. Father would show her pictures of pre-teen age girls whom he said looked like Mother. Mother did not think this was child pornography because the children were not "little kids." She stated Father was arrested the previous year for domestic violence against her and was directed to complete 52 weeks of anger management classes. She was not sure if he completed the classes. Father told the social worker there was no reason to be concerned about D.P. and S.P. Asked about pictures of children on his computer, he asserted they were the nieces of a friend from Brazil; he could not explain why they were posed in erotic positions.

Both parents acknowledged that they engage in frequent fights with each other. When interviewed by the social worker in the family home, D.P. stated he thought the police were at his home because his parents argue a lot. He stated that Mother always

goes out with her friends and she ignores him and S.P. when she is at home. He stated Mother does not love him or S.P. and only Father plays and talks with them. He stated that both parents look at pictures of unclothed people on the computer. He was uncomfortable and paced around the room when asked whether anyone had touched his penis. He stated the only person who had ever touched it was a boy at school and it happened on a school bus.

When interviewed by the social worker in the family home, S.P. stated Father is always on the computer in the living room looking at pictures of girls. She could not remember if the girls were nude but she thought they wore dresses. She denied that any sexual abuse had occurred. Both children demonstrated they knew the difference between truth and lies and stated they were willing to tell the truth when the social worker interviewed them. They were able to identify their private parts.

The federal agents found “massive amounts of Child Pornography and Child Erotica and videos . . . on the home computer belonging to father.” They also found a 10-second video clip of S.P. that was filmed by Father. The minor is wearing only a tank top, is lying on a bed that appears to be the one in which Mother sleeps, and appears to be posing in a sexual position with one hand behind her head and the other hand between her legs. It was not clear if her hand in on her upper thigh or her vagina. After the ten second clip of S.P., the video shows a family party. The federal forensic expert opined that it appeared the remainder of the video of S.P. had been taped over.

Mother was permitted to take the children to school. Later in the day at the school, an interview of S.P. was conducted by the social worker, a federal agent, and

a member of the Los Angeles Police Department's Internet Crimes Against Children task force that was assigned to be present at the November 27, 2007 execution of the federal search warrant. S.P. was shown the video of herself. She recognized the video and stated it was filmed by Father. During the interview, she lay on the floor and demonstrated poses that Father had her do in videos. She stated he videotaped her "lots of times." She stated he taped her when she came home from school and some of the times Mother was in the home but Mother was in another room.² Asked if she was told to keep the videotaping a secret, she stated she was told not to tell Mother. She stated D.P. was present during the videotaping and Father had D.P.'s penis touch her hands and vaginal area sometimes and videotaped it.

S.P. also described times when Father would lie on top of her. She demonstrated she would lie on her back and Father would lie on top of her face down. She stated she and Father did not wear underwear at those times. She stated Father had her touch his penis, and he has placed his penis inside of her vaginal area. She was uncomfortable when asked if her mouth has ever touched his penis and she did not respond to the question. She stated that after Father did these things to her ("playing around"), they would go to the 7-11 store to purchase gum and candy and sometimes D.P. would go with them.

Asked if she told Mother what was Father was doing to her, S.P. nodded in the affirmative and then she said: "Too bad! She don't care! Have it your way! She don't

² A January 17, 2008 follow up report from the police officer who participated in the interview at the school states that S.P. stated Mother had been in the room where the video was made but left the room crying.

care about nobody!” She would not state what she told Mother about the sexual abuse nor the time frame of the disclosure.

S.P. was taken to the Stuart House/Rape Treatment Center and given a physical examination. The examination revealed S.P. has a diminished hymen, which the social worker’s report states is suggestive of sexual abuse. After the exam, S.P. was questioned again. Asked if Father would say anything before he engaged in sexual activities, S.P. stated he would say “Do it. Come on!” She would tell Father to stop but he would tell her to stop crying or talking. She stated what Father did to her hurt “bad” and she cried when he was doing it to her. She pointed to the picture she drew of his penis and stated that was what hurt her.³ Asked if Father’s penis ever got her wet, she pointed to her hands and vaginal area. Asked where Father touched her with his hands, she pointed to her vaginal area but she became shy and would not say if he put his fingers inside of her. She stated Father made her keep her hands behind her back and he kept them there with a pink rope because that is her favorite color. She stated after Father finishes touching her he goes to sleep. She stated Father also has her touch her own private parts.

D.P. was also interviewed that same day at the Rape Treatment Center. Asked if he had seen nude pictures on Father’s computer, he said “maybe some” but would not elaborate. He stated that he and S.P. played the “roll around” game in which they rolled

³ When S.P. was interviewed she stated Father’s private area was brown with lots of black circles on it. Her drawing of Father’s penis has curly black hair on it and her drawing of D.P.’s penis has no hair on it.

The police report states that when S.P. was asked when was the last time that Father touched her vagina with his penis, the minor answered it was “yesterday.”

around on a bed, side by side, in just their underwear, and Father was often in the room watching them and he too was wearing just his underwear. He stated that Mother does not like the children to play the game and when she gets home she yells at the children to stop. He denied that any sexual touching takes place during the game. However he did state that sometimes Father videotaped them and had them pose in a manner similar to the videos of the Brazilian children that Father had. When he was informed that the agents had found a video of S.P. lying on a bed, he stated: “he never told my sister to do all those things.” D.P. would not state what “those things” are. He changed the subject and talked about Mother not taking care of him, and stated that the children’s nanny is the only person who takes care of him and cooks for him. Asked if he wanted to go back home to Mother, he stated: “Not really.” He said he preferred to live with his grandparents.

When the children were in the car with the social worker on the day the agents investigated their home, they began to giggle. Asked what they were laughing about, D.P. said “S-E-X!” Asked what that spells, both screamed “sex.” Asked what sex is, S.P. stated it is “when we open the door and papa is on top of mom like on top of me!” At that point, D.P. began to shush S.P. The children described seeing Father going up and down, and stated the parents knew they were in the room but did not stop. Asked if Father goes up and down when he is on top of her, S.P. giggled and did not answer.⁴

⁴ The police report states that the social worker related to the investigating detective what occurred in the car when the social worker was transporting the minors. The police report states that when S.P. was asked if Father goes up and down when he is on top of her, S.P. responded by nodding her head affirmatively.

D.P. intervened and stated that Father “loves her!” Asked what that means, neither child responded.

The social worker and the police detective viewed the parents’ individual profiles on Myspace.com. Father’s profile was covered with pictures of young girls in sexual/erotic poses, primarily of one of the Brazilian children, and it contained poetry and love letters written about that child, including a statement of his desire to be her lover. Because the parents were viewing each other’s profiles on a regular basis and leaving messages, Mother would see the poetry and the letters.

After the children were interviewed, Father was arrested and charged with the crime of lewd acts with a minor. Based on the information gained from the interviews of the minors, the social worker and the police detective re-interviewed Mother. The Department’s report states that when Mother was told of Father’s sexual abuse of S.P. and the possibility that Father facilitated forced sexual interaction between the children, that information had “little to no affect” on her, and she denied knowing of sexual acts between the minors and Father, and stated it would not be allowed in her home. She did not appear to have any emotion in making those declarations. She asserted she is the primary caregiver for the children, but then acknowledged that the nanny plays a large part in raising them and S.P. is probably closer to the nanny than to Mother. She acknowledged that Father is obsessed and in love with the Brazilian child, who is around 10 years old, that he had the child’s face tattooed on his arm, and that the child’s appearance and body structure is similar to S.P.’s. She stated Father threatened to kill her if she took the children away from him and she has learned to live in the same home

with him but separate from him. Mother sleeps in a bedroom, the children and their nanny sleep in another bedroom, and Father sleeps in the living room.

Mother stated that at the first school S.P. attended the minor exposed her private parts to boys at the school and asked them to touch her vaginal area. When S.P. was replaced to another school Mother received similar reports about such activity. Mother stated she did not tell Father because he is not involved in the children's academic life. Asked what she did when she learned about S.P.'s actions at school, Mother casually stated: "Well, I talked to her I guess, I don't know." She stated the children had walked in on her and Father having sexual relations a few times, the family often walks around the home naked or in just their underwear, and the special place that Father likes to take the minors is 7-11. She showed little emotion during the interview and when asked if the information about Father that was being disclosed to her would cause her to permanently cease her relationship with Father, she hesitated and then answered that she would leave him.

Father was also re-interviewed by the social worker and the detective. Asked about the video tape of S.P., he acted shocked and said it could not be something in which he was engaged. Ultimately he admitted to twice orally copulating S.P. and said it happened because of fights between Mother and him. However, he added that he may have done this more than twice but he could only remember two times.⁵ He stated the first time it happened Mother had left the home and the nanny was in another room. He

⁵ The police report states Father asserted the most recent time this happened was two days before he was arrested for domestic violence against Mother. The report states that arrest occurred on March 20, 2006.

could not remember where D.P. was. He stated Mother was home the second time it happened but was in her bedroom and D.P. was at music lessons. He denied any recent sexual conduct with S.P., denied any sexual behavior towards D.P. and said he did not remember filming the minors together. Then he was asked about inserting his penis into S.P.'s vagina and he put his head into his hands and stated he could not remember if that happened.

The children's nanny was interviewed. She denied seeing any evidence in S.P.'s clothing, such as blood, and stated she was not aware if the minor had expressed having sore body parts. The nanny stated it is she who takes care of the children, that Mother does not care for them, and that Father is better about spending time with them. She stated she feels very close to S.P., like a mother. She denied seeing inappropriate sexual behavior by the children. She stated the family is generally wearing just underwear when they are in the home.

2. Allegations In The Dependency Petition

The dependency petition alleges domestic violence by Father against Mother and continuous verbal altercations between the parents. It further alleges that Father repeatedly forcibly raped S.P. by placing his penis into her vagina causing her pain; Father fondled S.P.'s vagina and forced her to fondle his penis; Father orally copulated S.P.; Father videotaped S.P. during his rape of her; Father forced S.P. and D.P. to engage in sexual activities while videotaping them; and Father forced S.P. to pose in sexual manner while videotaping her. It was also alleged that Father and Mother engaged in sexual intercourse in the children's presence; Father exposed the children to

an extensive amount of child pornography; and Mother failed to take action to protect S.P. and D.P. when she knew of Father's ongoing sexual abuse of them. The counts alleging sexual abuse of S.P. and D.P. were alleged under subdivisions (b)-failure to protect; (d)-sexual abuse; (i)-cruelty; and (j)-abuse of sibling.

3. *Subsequent Reports*

The children were detained by the dependency court on November 30, 2007, and placed together in shelter care. The parents were given monitored visitation, with Father to have no visits while in custody.

The Department's January 16, 2008 report shows the family members were re-interviewed in mid-December 2007. Father asserted he "never used my penis on [S.P.]," never videotaped himself and S.P., or S.P. and D.P., having sex, and the only tape is the one with S.P. wearing only a top and no underwear. He stated he made that videotape after S.P. had taken a bath and was getting ready for bed. He asserted there was no sexual abuse of D.P. of any kind. Father also asserted that S.P. was acting out sexually before he orally copulated her. She had been found with a male family friend on top of him "humping." He denied that the minors had ever witnessed him and Mother having sex. He denied that the children had access to the pornography he had. Regarding his oral copulation of S.P., he stated he attempted to talk to mother about it on two occasions and asked her to help by spending more time with the children and not leaving him alone with S.P., but Mother did not comply with his request. He stated Mother spent the majority of her time with her friends and little time with the children.

He stated that after he orally copulated S.P. the second time he began spending more time on the computer and less time with the children.

Mother denied having knowledge of Father sexually abusing S.P. or D.P., and denied knowledge of any videotapes. She stated if she had known she would not have allowed it to happen. She denied noticing a change in the minors' behavior. She asserted that 95% of the time the children were with her. She stated that on the occasions when the children walked in on her and Father having sex, she and Father would stop, cover up and ask the children to close the door, and then she would get dressed and go find out what the children needed. Initially she denied knowing about the child pornography but then stated she asked Father to keep it off of the big computer in the home so the children would not gain access to it. Mother stated she knew of Father's ongoing relationship with the Brazilian child, including the pictures of the child on his computer and the tattoo of the child on his arm, but she felt that Father is an adult and she did not want to be involved. The social worker opined that at the very least Mother knew of the abuse and failed to protect the minors. During the interview, Mother lacked emotion and seemed detached from the minors. She was nonchalant and did not seem to understand the severity of the abuse her children sustained.

D.P. stated Father did nothing wrong and Father "is the only one who spent time with us and loves us." S.P. stated Father took off his clothes and "went on me." She would not elaborate, saying it was too hard to talk about what Father did. The social worker's report noted that both children have stated that Mother spent little time with

them and they did not feel loved by her. The social worker opined the minors do not feel safe with Mother.

A January 16, 2008 report shows that after being placed in foster care, the minors began displaying emotional problems. On one occasion, S.P. and a relative of the foster mother pulled their pants and underwear down, S.P. was on top of the girl, and the girl stated S.P. touched the girl's private parts with her hand. D.P. was watching and S.P. said he told them to do it. S.P. and D.P. were defecating on themselves and in their bedrooms. There was an incident when S.P. fondled D.P.'s penis. The foster mother stated she does not allow them to be alone together but when she is asleep they go into each other's rooms. S.P. was also reported to be aggressive towards D.P. and the foster mother, and S.P. was defiant and refused to follow rules. S.P. was replaced to the home of the foster mother's adult daughter, who is also a foster mother.

The minors were having weekly monitored visits with Mother. A report for the March 3, 2008 adjudication hearing shows that although D.P.'s foster mother reported the visits go well, S.P.'s foster mother reported the minors were defecating on themselves after their visits and on one visit Mother took S.P. into the bathroom and locked the door and S.P.'s foster mother had to ask Mother to leave the bathroom. Mother was visiting twice a week for two hours. A subsequent report states S.P. had begun to act out severely when she was not permitted to do something or was instructed to do something she did not want to do, like go to bed or to school. Her tantrums included screaming, throwing things and kicking, and while they were happening the minor was inconsolable. A referral for psychological evaluation was pending. Mother

was attending parenting classes and individual counseling, participating appropriately, and had not missed any sessions.

4. *The Adjudication/Disposition Hearing*

A contested adjudication and disposition hearing was held on April 9, 2008.

Father testified that he was convicted of lewd and lascivious conduct and sentenced to eight years. He denied the allegations against him in the dependency petition except for the allegation that he twice orally copulated his daughter. He also denied telling the social worker that he had he attempted to talk to Mother on two occasions about the oral copulations. He stated the children were lying when they told the social worker about other acts of sexual abuse by him. Father's attorney argued that the domestic violence count should be dismissed as remote in time, and that all allegations of sexual abuse should be stricken, except for Father having twice orally copulated S.P., because the Department did not prove those allegations. The court stated it did not believe Father's testimony wherein Father only admitted the allegation of oral copulation and denied of the other sexual abuse allegations.

The court sustained the petition as pled in its entirety, declared the minors dependents of the court, and placed custody of the children with the Department for suitable placement. The court ordered no family reunification services and no visitation for Father. Reunification services for Mother and monitored visits for her at a Department office were also ordered. The court directed that an Evidence Code section 730 evaluation of Mother and the minors be made, that Mother's counseling and

the minors' counseling be with a licensed therapist, and that the minors were not to be left alone with each other or with any other children.

CONTENTIONS ON APPEAL

Mother contends the trial court erred when it sustained the allegation that she knew of Father's sexual abuse of the minors and failed to protect them from Father's abuse and cruelty.

DISCUSSION

1. Examination of the Challenged Findings Is Appropriate

Section 300 begins with the following words: "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court." The Department asserts we do not need to consider Mother's challenge to the jurisdictional finding that she knew of Father's sexual abuse and cruelty and she failed to protect the minors. The Department asserts dependency jurisdiction over the children is already established by another jurisdictional finding, to wit, the finding that the parents' history of domestic violence places the children at risk of harm.⁶

We agree that the court's jurisdiction over the minors is established by its sustaining of the domestic violence allegation. Nevertheless, we agree with Mother that there is cause to examine the specific jurisdictional findings that she challenges. Those are not findings that should remain if they are not supported by substantial evidence. As

⁶ Jurisdictional findings made by a dependency court are reviewed under the substantial evidence test. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733.)

Mother observes, findings and orders made by the trial court at the jurisdiction and disposition hearings are the basis for future decisions of the trial court, including for example, whether to order reunification services, whether such services are successful, and whether a child can safely be returned to a parent's care.

2. *The Trial Court's Spoken Finding Is That Mother Knew or Should Have Known That Father Was Subjecting the Minors to Sexual Abuse*

The reporter's transcript shows that at the jurisdiction/disposition hearing, Mother's attorney argued that the section 300, subdivision (d) (sexual abuse) count should be amended by adding language to make the count state that Mother failed to take action when she knew *or reasonably should have known* of Father's sexual abuse. The reporter's transcript also shows that Mother's attorney argued that Mother should be stricken from the section 300, subdivision (i) (cruelty) count because there is no evidence of intentional conduct on the part of Mother, such as evidence that she offered the children up for sexual abuse.⁷

The reporter's transcript shows that when Mother's attorney addressed the subdivision (i) count for the second time, the dependency court stated that Mother failed

⁷ Section 300, subdivision (i) states: "The child has been subjected to an act or acts of cruelty by the parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from an act or acts of cruelty when the parent or guardian knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty." The cruelty count in this case alleges S.P. was sexually abused by Father by rape, fondling and oral copulation; Father forced S.P and D.P. to engage in sexual acts while he videotaped them; Father exposed the minors to an extensive amount of child pornography; the parents repeatedly engaged in sexual intercourse in the presence of the children; and Mother failed to take action to protect the minors when she knew of Father's ongoing sexual abuse.

to protect the children when she knew *or should have known* of Father's acts of cruelty. Thus, the court's spoken finding includes an amendment to the cruelty count: the addition of the phrase "or reasonably should have known." Necessarily then, the amendment is also applicable to the other counts in the petition that allege the same sexual abuse by Father as those alleged in the subdivision (i) count. That would include the b-1, b-2, d-1, d-2, j-1 and j-2 counts. However, despite the court's spoken finding, the court did not indicate that any of those counts would be amended by interlineations to include the "or reasonably should have known" language.

Given the substantial evidence in the record to support the trial court's spoken finding that if Mother did not know of Father's sexual abuse she certainly should have known of it,⁸ we do not perceive that the additional language will operate to relieve Mother of much, if any, responsibility for Father's having been free to continue his ongoing sexual abuse of the minors instead of being removed from the family home by

⁸ This substantial evidence includes the following. Mother knew S.P. acted out sexually at both of the schools she attended. The acting out was a glaring sign that something of a sexual nature was going on in the minor's life. There is evidence, known to Mother, that the source of this sexual activity could very well be Father. The record shows he was preoccupied with sex, especially child sex. Father had nude pictures on his computer that the minors could, and did, see. Mother acknowledged she asked Father to keep his child pornography off of the big computer in the home so that the children would not see it. Father watched the minors play the "roll around" game, a game they played on a bed while all three of them (Father and the minors) were in their underwear, and Mother was aware this was going on. Mother was aware of Father's sexual and love preoccupation of a Brazilian child who resembles S.P.

Thus, even discounting the substantial evidence that Mother was *told* of sexual abuse (S.P. nodded affirmatively when asked if she told Mother what Father was doing to her, and then the minor emotionally stated that Mother does not care; and Father told the social worker that he twice told Mother he had orally copulated S.P.), there were signs of sexual activity that Mother should have acted upon.

the dependency and criminal courts at an earlier point in time if Mother had reported him to proper authorities. Nevertheless, because the trial court specifically stated a finding that included the “or should have known” language, on remand of this case the dependency petition should be amended by interlineations to reflect that additional language in the “typed-in” portions of the subdivision b-1, b-2, d-1, d-2, i-1, j-1, and j-2 counts.

DISPOSITION

The order from which Mother has appealed is affirmed and the cause is remanded for further proceedings consistent with the views expressed herein. The appeal filed by Father is dismissed as abandoned.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.